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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

FRANCIS CLIFFORD, Commissioner of the Department of Health of Niagara County, N. Y.,

Petitioner,

vs

SUSAN B., DONNA MARIE HAZLETT and EMMA G., on their own behalf and on behalf of all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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February 27, 1980

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FRANCIS CLIFFORD, Commissioner of the Department of Health of Niagara County, N. Y.,

Petitioner,

vs

SUSAN B., DONNA MARIE HAZLETT and EMMA G., on their own behalf and on behalf of all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Francis Clifford, Commissioner of the Department of Health of Niagara County, New York respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered October 30, 1979 which affirmed a final judgment entered June 21, 1979 by the United States District Court for the Western District of New York (Elfvin, J.) holding a local law of the County of Niagara (Local Law No. 7, 1978) unconstitutional under Home Rule Article of the New York State Constitution (Article IX).

Preliminary Statement

The Petitioner, Francis Clifford, Commissioner of the Department of Health of Niagara County, New York has been sued in his official capacity and the judgment below is a judgment against the County of Niagara, holding invalid a local law of the County and enjoining its enforcement.

Since the commencement of the action, the County has strenuously insisted that the validity of its local law under the Home Rule Article of the State Constitution is not a matter to be decided by the Federal Courts. The District Court lacked jurisdiction over this question of State law because it would be unnecessary to decide any federal claim if the State law claim were resolved adversely to the County. Such adverse decision on the State law claim by a federal court would render non-justiciable the federal questions and the State question as well. For an erroneous resolution of the State law claim by a federal court would not be binding on the State courts or the parties. For these reasons, the County does not here argue or present to this Honorable Court for decision the State constitutional question which the District Court and Court of Appeals purported to determine. It is the County's position that the District Court and Court of Appeals lacked jurisdiction to determine said question of State law under the doctrines of abstention and justiciability.

The County of Niagara here argues and presents for a decision by this Honorable Court the sole question of a District Court's jurisdiction under the doctrines of abstention and justiciability.

Opinions Below

The initial Order was issued in this action by the United States District Court for the Western District of New York

(Elfvin, J.) on December 13, 1978, whereby the Court added Donna Marie Hazlett as a party plaintiff and is not officially reported. It and all subsequent District Court opinions, judgments and orders are filed in the District Court at Civil Action 78/823.

The District Court issued a Memorandum and Order on December 15, 1978, granting a preliminary injunction to plaintiffs based on a probability of success on their State law claim. Said Memorandum and Order is reproduced in the Appendix at pp. A19-A22.

On February 15, 1979, the Hon. John C. Broughton of the Supreme Court of the State of New York, County of Niagara, issued an opinion dismissing an action for declaratory judgment to resolve the pendant State law claim then pending in the federal District Court for lack of standing due to the refusal of the Plaintiffs in federal court to join as parties. The opinion has not been reported and is reproduced at pp. A23-A29 of the Appendix.

On May 23, 1978, the District Court issued a Memorandum and Order granting class action certification to the plaintiffs; partial summary judgment to plaintiffs on their State law claim and a permanent injunction against the enforcement of Niagara County's Local Law No. 7. Said Memorandum and Order have not been reported and are reproduced at pp. A30-A38 of the Appendix.

The United States Court of Appeals for the Second Circuit did not render a separate opinion but affirmed "substantially on the opinions of Judge Elfvin below dated December 15, 1978, and May 23, 1979." (See A18.)

Jurisdiction

This is a civil action to which the County of Niagara is a party and in which a local law of Niagara County has been

held unconstitutional only under the New York State Constitution. The Plaintiffs invoked jurisdiction in the District Court under 42 U.S.C. Sec. 1983 and 28, U.S.C. Sec's. 1331 and 1343 (1976).

The date of entry of the judgment in the U.S. District Court for the Western District of New York sought to be reviewed is May 23, 1979, such entry having been made *nunc pro tunc* on June 21, 1979. Notice of Appeal to the Court of Appeals was duly filed by the defendant, Francis Clifford in the U.S. District Court for the Western District of New York on the same day, June 21, 1979.

The judgment of the United States Court of Appeals for the Second Circuit was entered on October 30, 1979. On January 25, 1980, the time within which to file this Petition was extended by Order of Mr. Justice Marshall to and including February 27, 1980 (No. A-634).

The jurisdiction of this Honorable Court is invoked by Petitioner under 28 U.S.C. § 1254(1).

Questions Presented

Whether the District Court lacked jurisdiction under the doctrines of abstention and justiciability to enter a permanent federal injunction based solely upon a pendant State constitutional claim.

Statement of the Case

On October 3, 1978, the Niagara County Legislature adopted Local Law No. 7 after a public hearing held September 12, 1978 and continued on October 3, 1978. Local Law No. 7 was then transmitted to and filed by the Secretary of the State of New York on or about October 6, 1978. It provided for the regulation of abortion in Niagara

County. Except for §5, dealing with the publication of forms by the County Health Department, all of the provisions of Local Law No. 7 become effective, pursuant to §12, sixty (60) days from the date of filing with the Secretary of State. See Record on Appeal, Docket No. 25, Transcript of December 5, 1978, pp. 3-4.

On December 5, 1978, Respondents (hereinafter "Plaintiffs") filed a class action in the United States District Court for the Western District of New York, to enjoin the enforcement of Local Law No. 7 [referred to in Plaintiffs' papers by its Resolution No. 336-78] claiming jurisdiction under 28 U.S.C. §§ 1331, 1343(3) and (4) (1976), and seeking relief under 42 U.S.C. §1983 (1976), and 28 U.S.C. §2201 (1976). They alleged that Local Law No. 7 violated their rights under the New York State Court of Appeals decision entitled, *Robin* v. *Incorporated Village of Hempstead,* 30 N.Y. 2d 347 (1972), which interpreted Art. IX of the New York State Constitution; the First, Fourth, Fifth, and Ninth Amendments and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and "the corresponding provisions of the New York State Constitution." They filed a motion for a temporary restraining order or preliminary injunction. See Record on Appeal, Docket Entry No. 29.

The Plaintiff Susan B. is an unmarried resident of Niagara County, who at the time of the commencement of the action was 20 years of age and between five and six weeks pregnant. Susan B. did not want the father of her child notified [Sic. Local Law No. 7 does not require notice to an unmarried father], did not want to wait twenty-four (24) hours after medical consultation to have her abortion, did not want to see pictures of the unborn and did not want to travel to Erie County for her abortion.

The Plaintiff Donna Marie Hazlett is a married resident of Erie County, who at the time of her admission as a party plaintiff on December 12, 1978 was 29 years of age and five months pregnant. Mrs. Hazlett had given birth to four children previously and had lost one of these children due to Downes Syndrome and pneumonia at the age of nine months. Her physician and his hospital are located in Niagara County. Her current pregnancy was estimated by her physician to be defective and with only a ten per cent chance of a live birth. Mrs. Hazlett's chief objection was the requirement of Local Law No. 7 that she be shown pictures of the developing unborn child prior to her abortion as part of the medical counseling required by the law. She also objected to the required five (5) day waiting period after notice to her husband.

The Plaintiff Emma G. is a divorced resident of Niagara County, who at the time of her admission as a party plaintiff on December 15. 1978 was 24 years of age and six weeks pregnant. She is the mother of one child and did not wish to be shown pictures of the developing unborn child as part of the medical counselling required by Local Law No. 7. Her objections also included the twenty-four (24) hour waiting period after such counselling and the provision of information concerning the risk of medical complications from abortion.

The Defendant, Francis Clifford, is Commissioner of the Department of Health of Niagara County and is charged with the administration of Local Law No. 7.

On December 15, 1978, the District Court issued a Memorandum Opinion and Order granting a preliminary injunction to Plaintiffs based on a substantial likelihood of success on their pendant claim under the New York State Court of Appeals decision, entitled *Robin* v. *Incorporated*

Village of Hempstead, supra, and Art. IX of the New York State Constitution. (A19-A22.)

On January 23, 1979, Niagara County Legislator John H. Kolecki, the sponsor of Local Law No. 7 and other taxpayers commenced a declaratory action in the Supreme Court of the State of New York, County of Niagara to declare Local Law No. 7 valid and constitutional under Art. IX of the New York State Constitution and the State court decisions thereunder. A motion for summary judgment was made and the attorney of record for the Plaintiffs in this federal action was notified. Record on Appeal, Exhibit 3 and Exhibits "A" through "E" annexed thereto.

On February 15, 1979, the Hon. John C. Broughton of the Supreme Court of the State of New York, County of Niagara, issued an opinion denying the motion for summary judgment and dismissing the action for declaratory judgment on the ground that no party before him had challenged the constitutionality of Local Law No. 7. The Plaintiffs in this federal action had been admitted as *amici curiae* and participated in the State court action. (A23-A29.)

On March 5, 1979, Plaintiffs moved in the District Court for class certification, partial summary judgment on the pendant claim under Art. IX of the New York State Constitution and for a permanent injunction against the enforcement of Local Law No. 7. Record on Appeal, Docket No. 18.

On May 23, 1979, the District Court issued a Memorandum Opinion and Order granting the relief requested in Plaintiffs' motion of March 5, 1979 in all respects and refusing the Petitioner's request to abstain under the doctrine announced in *Railroad Comm'n* v. *Pullman Co.,* 312 U.S. 496 (1941). (A30-A38.) Record on Appeal, Docket No. 27, Transcript of March 5, 1979, at pp. 3, 23-27.)

On June 21, 1979, the District Court Clerk entered judgment *nunc pro tunc* as of May 23, 1979 by direction of the District Court.

On the same day, June 21, 1979, the Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Second Circuit from the judgment of the District Court entered May 23. 1979.

On October 30, 1979, the United States Court of Appeals for the Second Circuit (Meskill, Kearse and Dooling, J. J.) unanimously affirmed "substantially on the opinions of Judge Elfvin below dated December 15, 1978, and May 23, 1979." (A-18.)

On January 25, 1980, Mr. Justice Marshall granted an Order extending the time within which to file this Petition to and including February 27, 1980. (A-16.)

Factual Setting

For nearly 100 years in New York the delicate question of State versus local legislative power has been regulated chiefly by State judicial interpretations of the State Constitution.

The words of Chief Judge Cardozo in 1927 proved only too prophetic:

> "Home Rule for cities, adopted by the people with much ado and after many years of agitation, will be another Statute of Uses, a form of words and little else if the courts in applying the new tests shall ignore the new spirit that dictate their adoption. The municipality is to be protected in its autonomy against the inroads of evasion." *Matter of Elm Street,* 246 N.Y. 72, 158 N.E. 24

Municipalities were not so protected. Restrictive court interpretations, often in conflict with one another, severely restricted the effectiveness of the Home Rule amendments

to the State Constitution in 1924 and 1938. Comment, "Municipal Home Rule in New York", 22 Syracuse L. Rev. 736 (1970); Note, "Home Rule and the New York Constitution" 66 Col. L. Rev. 1145, 1148-1151 (1966); Richland, "Constitutional City Home Rule in New York (Part I), 54 Col. L. Rev. 311 (1954).

Efforts by the bench and bar to reconcile the Home Rule interpretations of the highest state court in New York have resulted in a general state of confusion and unpredictability during the last five decades. Note, "Home Rule and the New York Constitution," *supra,* 66 Col. L. Rev. 1145, at 1153 (1966); Comment, "Home Rule: A Fresh Start," 14 Buff. L. Rev. 484, 488 (1965); Diamond, "Some Observations on Local Government in New York State," 8 Buff. L. Rev. 27, 35 (1958); Richland, "Constitutional City Home Rule in New York" (Part II), 55 Col. L. Rev. 598, 623 (1955).

The most recent Home Rule amendment to the New York State Constitution was adopted in 1963, but the basic structure was "left substantially intact by the 1963 amendment." Note "Home Rule and the New York Constitution," *supra,* 66 Col. L. Rev. 1145, at 1162 (1966).

> "It is unlikely that the new amendment will have the effect of changing a single court decision dealing with home rule. The balance of power between the state and its municipalities remains unchanged * * *. Grad, "The New York Home Rule Amendment—a Bill of Rights for Local Government?", Local Government Law Service Letter, June, 1964, pp. 6, 9, quoted *Id.,* at 1152, note 44.

One can search in vain for federal judicial interpretations in this sensitive area of State law. Review by this Honorable Court of Art. IX decisions of the highest State

and federal courts has been confined to the federal questions involved. See, *e.g., Lockport* v. *Citizens for Community Action,* 430 U.S. 259 (1977). The only exception seems to be *Manes* v. *Goldin,* 400 F. Supp 23, affirmed without opinion, 423 U.S. 1068 (1976), in which an attack upon a State law as a pendant claim under the State Constitution's Home Rule Article was brushed aside in summary fashion as too frivilous to consider. *Id.* at 28.

The case at bar is the first officially reported instance of a federal judge *striking down* a local law under Article IX, the Home Rule Article of the State Constitution.

In New York a local law enjoys the status of a "state statute" for the purpose of *direct appeal* to the New York State Court of Appeals. *Sonmax, Inc.* v. *City of New York,* 43 N.Y. 2d 253 (1977).

Niagara County is the first local government in New York State to assert a local problem unique to the County so as to fit within the exception in *Robin* v. *Incorporated Village of Hempstead,* 30 N.Y. 2d 347 (1972). In that case, the New York State Court of Appeals interpreted the Constitution and general laws of New York to evince an intention on the part of the State to pre-empt regulation of abortion and medical practice *except* when the local legislation was justified by a local problem unique to the local government area as opposed to the rest of the State.

As the first United States District Court ever to strike down local legislation under Article IX of the State Constitution in a reported decision, the Court below also became the first federal Court to attempt to finally determine a question of State Constitutional law expressly left open by the New York State Court of Appeals in *Robin* v. *Incorporated Village of Hempstead, supra,* and not ruled upon since that decision.

The question presented upon this appeal is whether said attempted final resolution of this most sensitive question of State law was made by a *court of competent jurisdiction* within the federal doctrines of abstention and justiciability.

FACTS

On October 3, 1978, the County Legislature adopted Local Law No. 7 (1978) regulating the performance of abortions in Niagara County. (Statement of the Case, at 4.)

On December 15, 1978, the United States District Court for the Western District of New York (Elfvin, J.) entered a preliminary injunction against enforcement of the local law, based *solely* upon the Plaintiff's pendant State Constitutional claim that the County was without power under the Home Rule Article (Art. IX) to adopt the local law. (Id. at 6.)

On January 23, 1979, the sponsor of the local law and other taxpayers commenced a declaratory judgment action in the State courts to resolve the federal Plaintiffs State Constitutional claim in the State courts. (Id. at 7.)

On February 15, 1979, the State courts dismissed said declaratory judgment action because the federal Plaintiffs, who appeared as *amici* in the State courts, refused to become parties and submit their State Constitutional claim in the State courts. (Id. at 7.) The entry of judgment has been deferred pending resolution of the question of federal abstention in the federal courts.

On May 23, 1979, in the federal court action, Judge Elfvin expressly declined to abstain over the objection of the County of Niagara that Plaintiffs and the Court were obligated to submit the State Constitutional claim to the State courts in the pending declaratory judgment proceeding. (Id. at 7.) Judge Elfvin entered a permanent injunction

against the enforcement of the local law, based solely upon the pendant State Constitutional claim under the Home Rule Article (Art. IX). (Id. at 7.)

Reasons For Granting the Writ:

THE FEDERAL QUESTION OF ABSTENTION HEREIN HAS BEEN DECIDED BELOW IN A WAY WHICH IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH THE APPLICABLE DECISIONS OF THIS HONORABLE COURT.

Abstention

Where there is an action pending in State court that will likely resolve the pendant state-law questions, this Honorable Court has regularly "ordered" abstention, *Harris Co. Commr. Court* v. *Moore,* 420 U.S. 77, 83 (1975). This is especially so where *specialized* State Constitutional provisions are involved in the pendant state-law questions. *Id.* at note 8. *See Askew* v. *Hargraves,* 401 U.S. 476 (1971), wherein a dispositive State Constitutional claim was pending in State court. And where, as in the case at bar, Petitioner is the *first* local government to claim to be within an exception carved out by the New York State Court of Appeals in interpreting the New York State Constitution (see p. 10, *supra*), failure of the federal court to abstain and defer to a pending State court proceeding is in direct and irreconcilable conflict with the applicable decisions of this Honorable Court. *Askew* v. *Hargraves, supra; Reetz* v. *Bozanich,* 397 U.S. 82 (1970); *Harris Co. Commr. Court* v. *Moore, supra.*

Of equal importance, serious questions as to justiciability are raised by a failure to obey the doctrine of abstention under such circumstances. Since such questions have not been specifically addressed by this Honorable Court, they will be discussed in greater detail.

THE FEDERAL QUESTION OF JUSTICIABILITY HEREIN HAS NOT HERETOFORE BEEN SPECIFICALLY DETERMINED BY THIS HONORABLE COURT.

The County is not aware of any precedent, at least since *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938), for a permanent federal injunction of any State or local law or State executive action premised on a pendant State constitutional claim alone.

The reason for this lack of precedent is not hard to discover. Such a "permanent" federal injunction would rest merely upon a prediction of State constitutional law, upon which State courts have the final word. As such, it would be in the nature of an advisory opinion, subject to relitigation and revision elsewhere.

Federal judgments on pendant *nonconstitutional* State claims are encouraged because they *avoid* unnecessary constitutional adjudication. *Hagans* v. *Lavine,* 415 U.S. 528 (1974); *UMW* v. *Gibbs,* 383 U.S. 715, 726 (1966); *Cf. Siler* v. *Louisville & Nashville Ry. Co.,* 213 U.S. 175 (1909) (pre-*Erie*).

Also, it is perfectly clear, given adequate federal question jurisdiction, that the federal court has *power* to decide the whole case, including the issuance of a permanent federal injunction against a State or local law premised upon a pendant State constitutional claim alone, without ruling on any federal question. *Reetz* v. *Bozanich,* 397 U.S. 82 (1970); *Sterling* v. *Constantin,* 287 U.S. 378 (1932).

But it is respectfully sudbmitted that the power has not been exercised, at least since *Erie,* and that the unarticulated reason for the *non*exercise of the power is the rule against advisory opinions.

In *Sterling* v. *Constantin, supra,* the Court was careful to state that the pendant State constitutional question was

properly before it and that it possessed the power to decide that question. *Id.* at 393-394. Nevertheless, the Court preferred to *pass over* the State constitutional claim and reach and decide the Federal constitutional questions under the Fourteenth Amendment. *Id.* at 396.

The Court stated:

> "While we recognize the force of these observations, and the question of the interpretation of the provisions of the state constitution is before us, *it is still a matter of local law, as to which the courts of the State would in any event have the final word.* We do not find it necessary to determine that question and we shall not attempt to explore the history of Texas or to review the decisions of the state courts cited by the appellees. We pass to a consideration of the federal question presented, and for that purpose we shall assume, without deciding, that the law of the State authorizes what the Governor has done." *Id.* at 396. (emphasis supplied).

It should be recalled that *Sterling* v. *Constantin, supra,* was a case of emergent protection of federal constitutional rights in which the Governor of Texas had declared martial law in an attempt to override a preliminary injunction by a federal district court. Abstention to obtain a State court interpretation of the Texas Constitution would not have been possible even if the case had been decided after *Railroad Comm'n.* v. *Pullman Co.,* 312 U.S. 496 (1941).

Reetz v. *Bozanich, supra,* 397 U.S. 82 (1970) involved certain specialized provisions of the Alaska Constitution, Art. VII, §§ 3 and 15, which reserved fish and wildlife in their natural state to the people for common use and expressly prohibited exclusive rights or special privileges in fisheries in the natural waters of the State. Plaintiffs in federal district court challenged certain Alaskan commercial fishing legislation under these provisions of the Alaska constitution and under the Federal Constitution. The Supreme Court held that the federal district court had *power* to decide the pendant State constitutional claim but ordered abstention. A decision on the pendant claim adverse to the commercial fishing legislation would render the Federal constitutional claims moot. Thus, if the federal district court were inclined to decide adversely to the challenged legislation, the Alaska Constitution would have become the whole "nub" of the controversy. *Id.* at 87.

The interpretation of State Constitutions, and the important question of when and to what extent such interpretations should be changed or modified, are, of course, fully committed to the judicial power of the highest State court. The Supreme Court has regularly ordered federal district courts to abstain where as in the case at bar, the pendant claim arises under a specialized provision of the State constitution which is without substantive counterpart in the Federal Constitution. *Harris County Commrs. Court* v. *Moore,* 420 U.S. 77 (1975); *Reetz* v. *Bozanich, supra,* 397 U.S. 82 (1970); *Dept. of Social Services* v. *Dimery,* 398 U.S. 322 (1970). See *White* v. *Edgar,* 320 A2d 668, 684 (Me., 1974); "Developments in the Law—Section 1983 and Federalism", 90 Harv. L. Rev. 1133, 1256-1257 (1977); Field, Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine, 122 U. Pa. L. Rev. 1071, 1099, note 108 (1974).

Even where the State constitution and the Federal Constitution have the same or similar substantive provisions, the Supreme Court has ordered abstention where the challenged State or local law is part of an integrated scheme of State law. *City of Meridian* v. *Southern Bell Tel. & Tel.,* 358 U.S. 639, 641 (1959) (Impairment of Contract Clause). See *Harris County Commrs. Court* v. *Moore, supra,* at 77, note 8.

It is to be noted that the question under the New York Constitution which the court below purported to decide is a *specialized* provision, without substantive counterpart in the Federal Constitution, that the question involved an integrated scheme of State law, including Article IX of the New York Constitution, the Statute of Local Governments and the Municipal Home Rule Law and that the words and concepts employed by the drafters of all of these provisions are derived in large part from language created by the New York State Court of Appeals in its evolving interpretation of constitutional municipal home rule in New York State. *Adler* v. *Deegan,* 251 N.Y. 467, 473-474 (1929).

The purported final judgment of the court below cannot prevent relitigation of the same issue by the same or different parties in a proper forum. The County did not submit the Home Rule question for decision or consent to its adjudication in the federal court. Record on Appeal, Docket Entry No. 27, Transcript of March 5, 1979, at pp. 3, 23-27. See *England* v. *State Board of Medical Examiners,* 375 U.S. 411, 419 (1964); *Lecci* v. *Cahn,* 493 F2d 826 (CA2, 1974).

An interpretation of a state statute by a state court *under a misapprehension of federal law* will not be binding on a federal court, *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U.S. 109 (1924); *Tipton* v. *Atchison, Topeka, etc. R. Co.,* 298 U.S. 141, 148 (1936); *Breisch* v. *Central R. Co.,* 312 U.S. 484 (1941); *United States* v. *Bedford,* 519 F2d 650, 654 (CA3, 1975) *cert. den.* 424 U.S. 917 (1976), and the lower court's purported final judgment, if found to be based upon a misapprehension of the New York Constitution and laws, will be given *no greater effect* by the courts of New York State. U.S. Const., Art. IV, § 1; 28 U.S.C. § 1738 (1976); *Union & Planters Bank* v. *Memphis,* 189 U.S. 71 (1903); *Wright* v. *Georgia R.R. & Banking Co.,* 216 U.S.

420 (1910); *City of Covington* v. *First National Bank,* 198 U.S. 100 (1905); *Oklahoma Packing Co.* v. *Oklahoma Gas & Elec. Co.,* 309 U.S. 4 (1940); *McCune* v. *Frank,* 521 F2d 1152 (CA2, 1975); *Lombard* v. *Board of Education,* 502 F2d 631 (CA2, 1974), *cert. den.* 420 U.S. 976 (1975).

Because it will not bar relitigation and authoritative determination in another forum of the same issue by the same or different parties, the purported final judgment of the lower court was in the nature of an advisory opinion. *Frasch* v *Moore,* 211 U.S. 1 (1908); *Hayburn's Case,* 2 Dall. 409, 412 (1792); *United States* v. *Yale Todd,* 1794, summarized in note by Chief Justice Taney in *United States* v. *Ferreira,* 13 How. 39, 51-53 (1851).

Even if not relitigated by the same parties in State court, the purported final judgment of the court below would be subject to reargument, collateral attack or unenforceability by a controlling decision on Local Law No. 7 by the New York State Court of Appeals. *Pierce* v. *Cook & Co.,* 518 F2d 720 (CA10, 1975), *cert. den.* 423 U.S. 1079 (1976).

The Tenth Circuit Court of Appeals stated:

> "[T]he federal courts in which plaintiffs were forced to litigate have given them substantially different treatment than that received in state court by another injured in the same accident. The outcome determination principle mandated by *Erie* v. *Tompkins* has been violated." *Id.* at 723.

Jurisdiction was clearly lacking in the court below under the federal doctrines of abstention and justiciability. The imposition of the so-called permanent injunction was particularly offensive, however, in view of the State court proceeding then pending. The Hon. John C. Broughton of the Niagara County Supreme Court and the parties to *Kolecki et al.* v. *County of Niagara* had eliminated all except the Home Rule issue and were ready to proceed to a determi-

nation of the validity of Local Law No. 7 with a direct appeal to the New York State Court of Appeals. See Opinion of Broughton, J., Appendix, at A 26. State court determination of the issue was prevented only because the plaintiffs in the federal action, who had joined as *amici* in the state action, *Id.* at A 23, refused an invitation to become parties challenging Local Law No. 7 so that the State action could proceed to judgment, as Judge Broughton had indicated would have occurred. Id. at A28.

Prior to the entry of the final judgment in the case at bar, the federal District Court below was requested to vacate the preliminary federal injunction against Local Law No. 7, to retain jurisdiction of the federal question and to relegate the plaintiffs to Judge Broughton's court for determination of their claim under the New York Constitution. See Record on Appeal, Docket No. 27, Transcript of March 5, 1979, at pp. 3, 23-27; Cf. Exhibit 3 to Record on Appeal. If that request had been granted, it is very likely that a ruling by the New York State Court of Appeals on the validity of Local Law No. 7 under Art. IX of the New York Constitution would now be in place.

The District Court below should not have sanctioned the refusal by Plaintiffs in this action to join as parties in the action before Judge Broughton in State court. The federal preliminary injunction could continue to protect all federal rights, the plaintiffs in this action could clearly reserve their federal claims while in State court, *England* v. *La. State Board of Medicine,* supra, 375 U.S. 411, 419 (1964), and the direct appeal to the New York State Court of Appeals where the only question involved is the constitutionality of a local law, *Sonmax, Inc.* v. *City of New York,* 43 N.Y. 2d 253 (1977), provided a plain adequate and efficient remedy for resolution of the issue under Art. IX of the New York State Constitution. *Harris County Commrs. Court* v. *Moore, supra,* 420 U.S. 77 (1975).

The Court stated:

> "Where there is an action pending in state court that will likely resolve the state-law questions underlying the federal claim, we have regularly ordered abstention." *Id.* at 83.

The same federal policies which would dictate retention of jurisdiction if the District Court believed the State constitutional claim would be rejected, *Manes* v. *Goldin, supra,* 400 F. Supp. 23, aff'd without opinion, 423 U.S. 1068 (1976), also dictate the opposite procedures of abstention, or of passing by the State constitutional claim without deciding it, *Sterling* v. *Constantin, supra,* 287 U.S. 378, 396 (1932), if the District Court believes the State constitutional claim would be sustained. It is preferable, and indeed mandatory, to avoid an unnecessary State constitutional adjudication by a federal court which would, in any event, amount to little more than an advisory opinion, since the State courts must have the final word under *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938). Compare *Murrow* v. *Clifford,* 502 F2d 1066 (CA 3, 1974).

In an analagous situation, the Third Circuit Court of Appeals stated:

> "[T]he same policy which dictates [one] procedure when [the District Court] believes the supremacy claim should be sustained dictates the opposite procedure if [the District Court] is inclined to reject it. The other two members of the three-judge district court might well disagree with [the single judge], on the supremacy issue, and by deciding in plaintiff's favor on that ground avoid a more serious constitutional adjudication. See Judge Winter's opinion in *Doe* v. *Lukhard,* 493 F2d 54 (CA4, 1974). We hold, therefore, that it is improper for a single district judge to decide a supremacy clause claim *against* the

claimant when it is pendant to a constitutional claim which must be decided by a three-judge district court. *Id.* at 1070.

In the case at bar, the District Court had determined in its Memorandum and Order granting a preliminary injunction that there was a substantial likelihood that the State constitutional claim would be sustained and that upon that issue, no evidentiary hearing would be required. (A22.) When the County urged abstention, as noted in the District Court's Memorandum and Order granting a permanent injunction (A 31), the District Court should have abstained rather than proceed to a final judgment on the New York State Constitution which would amount to an advisory opinion.

Conclusion

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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February 27, 1980

APPENDIX A

Constitutional, Statutory and Local Law Provisions Involved

New York Constitution

Article IX, §2, subdivision (c), sub-paragraph (ii) in pertinent part: "In addition to powers granted in the statute of local governments or in any other law, * * * (ii) *every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects, whether or not they relate to the property, affairs or government of such local government,* except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or goverment of such local government: * * *

* * * (10) The government, protection, order, conduct safety, *health* and well-being of persons or property therein. * * * (emphasis added)

Local Law No. 7 of Niagara County

WHEREAS, the State of New York has failed to establish any abortion standards designed to ensure that the abortion decision will be made with truly informed consent, and

WHEREAS, the primary duty of any society is to protect the life and well-being of each of its members, and

WHEREAS, it follows that Niagara County, through its lawful power to protect the health and safety of its citizens, may enact a local law designed to offer maximum protection to the life and health of the mother who seeks to obtain an abortion, and

WHEREAS, the natural right of spouses and parents or guardians to oversee the welfare of their minors requires that they should be notified prior to an abortion, and

WHEREAS, abortion constitutes a major surgical procedure which can result in complications and which ought, therefore, to require fully informed consent on the part of the patient—so that she may fully understand the nature of the act to be performed as well as its possible consequences for her health, and

WHEREAS, such fully informed consent is possible only when the pregnant woman is presented with the scientific evidence which led the pro-abortion physician editors of the *Journal of the California State Medical Association* (September, 1970) to write "... of the scientific fact, which everyone really knows, that human life begins at conception and is continuous whether—intra—or extra-uterine until death", and

WHEREAS, failure to be fully informed of the above-mentioned scientific fact might allow a woman to have an abortion and—only at some later time—come to be the awesome realization that this act involved the taking of a human life —a realization which might cause her serious, and potentially irreversible, mental and emotional harm, and

WHEREAS, the keeping of adequate and confidential records of this major surgical procedure as well as the periodic publication, by the Niagara County Health Department of a statistical report based upon such data would contribute to the health, safety, and welfare of the citizenry, now, therefore, be it

RESOLVED, that the County of Niagara proposes the adoption of the following Local Law:

Section 1. *Definitions*

"Abortion" means an act committed upon or with respect to a female, whether by another person or by the female herself, whether she is pregnant or not, whether directly upon her body or by the administering, taking or prescription of drugs or in any other manner, with an intent to cause a miscarriage of such female.

"Department" shall mean the Niagara County Health Department.

"Medical Counselling" shall mean the description of the abortion procedure, description of the particular medical risks incurred through the particular medical consequences of the abortion procedure either to the woman or to her unborn child.

"Medical Emergency" shall mean that an immediate and grave threat to the life or physical health of the female would be caused by the delay occasioned by the requirements of consent or notice imposed by Sections "2" or "3" of this Local Law.

Section 2. *Consent of Female*

(A) Except as provided in Section "4" of this Law, no physician shall perform or induce an abortion upon any female unless said female certifies her consent to the abortion in writing. Said consent must contain a statement by the female that it is informed and freely given, that it is not the result of coercion, and that the materials specified in Section "5" (A) of this Law, have been provided, that the female has read and understood them, or, if she cannot read, that she has had their contents explained to her.

(B) Except as provided in Section "4" of this Law, the consent of a female to an abortion shall be

obtained not more than 30 days before the abortion and not less than twenty-four hours before said abortion. The time of obtaining said consent shall be certified in writing by the physician performing or inducing the abortion.

(C) Except as provided in Section "4" of this Law, no abortion shall be performed or induced unless, prior to said abortion the attending physician: (1) certifies in writing that the female has been provided with the written materials specified in Section "5" (A) of this Law, and (2) causes any notice and material to be given to the extent required and in the manner specified by Section "3" of this Law and (3) engages in the medical counselling of the female at least 24 hours prior to the proposed abortion at which time the physician shall inform the female of the following in order to insure that her written consent is informed and freely given.

(i) that according to the best judgment of the attending physician, she is pregnant;

(ii) the number of weeks elapsed from the probable time of conception, based upon information provided by the female with regard to the time of her last menstrual period and/or after a history and medical examination and appropriate laboratory tests.

(iii) A description in detail of the following anatomical physiological characteristics of the particular unborn child at the gestational point of development at the time that the abortion is to be performed: appearance, mobility, tactile sensitivity, brain and heart function, the presence of internal organs and external members.

Said description shall also include a visual presentation through photographs of the development of a human fetus, with emphasis on the state of development at which the proposed abortion is to be performed.

(iv) that an unborn child may be viable and capable of surviving outside the womb by natural or artificial life support systems and that an attending physician has an obligation to provide immediate medical care for a viable child that is the result of an abortion.

(v) that abortion is a major surgical procedure which could result in the following complications: hemorrhage, perforated uterus, infection, menstural disturbances, sterility, miscarriage, prematurity in subsequent pregnancies psychological problems and emotional disturbances.

(vi) that the public and private agencies are available to assist the female during pregnancy, and after birth, and that various agencies are available to assist in placing a child for adoption.

(vii) such other and further information as the physician in the exercise of his medical judgment shall determine to be necessary for the female to give an informed consent to the proposed abortion, with full knowledge of its nature and consequences.

(D) The attending physician shall also give the female instructions on how to insure a healthy and safe recovery should the female decide to proceed with the proposed abortion.

(E) Except as provided in Section "4" of this Law, no abortion shall be performed or induced upon or with respect to any female who is married except if her written informed consent is obtained in the manner provided in Section "2" (a) and (b) above and except by a physician who is in possession of proof that at least five (5) days before the abortion, the spouse of said female received written notice of the proposed abortion and copies of the materials provided in Section "5" of this Law.

Section 3. *Consent of Minor: Notice*

(A) Except as provided in Section "4" of this Law, no abortion shall be performed or induced upon with respect to any female under the age of 18 who has never been married, except if her written informed consent is obtained in a manner provided in Section "2" of this Law and except by a physician who:

(i) is in possession of a written consent to the abortion signed nor more than thirty (30) days prior to said abortion nor less than twenty-four (24) hours before said abortion by a parent, guardian or other person having legal custody of such female; or

(ii) is in possession of proof that at least five (5) days before the abortion, a parent, guardian, or other person having legal custody of such female received written notice of the proposed abortion and copies of the materials provided in Section "5" (A) of this Law, or

(iii) is in possession of a written waiver of notice of the abortion, signed no more than thirty (30) days, no less than twenty-four (24) hours before the proposed abortion by a parent, guardian or other person with legal custody; or

(iv) is in possession of a consent obtained by order of a Justice of the Supreme Court of the State of New York for good cause shown, after such hearing as said Justice deems necessary; or

(v) has made a reasonable judgment, in good faith, based upon documentary evidence, that such female is eighteen (18) years of age or older or has been or is married.

(B) The proof of written notice, specified in subdivision (e) of Section "2" in paragraph (ii) of sub-(a) of Section "3" of this Law, shall consist of:

(i) a return receipt evidencing delivery and receipt of the notice by registered or certified mail or if acceptance was refused, the original envelope bearing a notation by the postal authorities that receipt was refused and an affidavit by or on behalf of the person seeking to establish the giving of notice that a copy of such written notice and refusal to accept was forthwith sent to the parent, guardian, or other person having legal custody of such person, by ordinary mail to the same address; or

(ii) an affidavit or affirmation by a physician licensed to practice medicine in this state that he or she has personally delivered the notice.

Section 4. *Medical Emergency*

The requirements of notice under Section "3" of this Law and/or consent required by Section "2" shall not be imposed when a physician makes a finding in good faith and based upon reasonable medical judgment that a medical emergency exists. The existence of a medical emergency shall be certified in writing by the attending physician and the grounds upon which the physician relies to make such determination shall also be stated.

Section 5. *Printed Information; Forms; Promulgation*

(A) The department shall cause to be published printed materials to be supplied by the attending physicians as provided in Sections "2"(a), "2"(c) and "3"(a) (ii) of this Law:

(i) materials designed to inform concerned parties of public and private agencies and services available to assist the female through pregnancy, at childbirth (and while the child is a minor), including a list of reputable adoption agencies.

Such materials shall include a comprehensive list of the agencies available and a description of the manner in which they might be contacted.

(ii) materials designed to inform concerned parties of the anatomical and physiological characteristics of the unborn child at various gestational points of development including appearance, mobility, tactile sensitivity, brain and heart function, the presence of internal organs and external members. Said materials shall include a visual presentation through photographs of the development of a human fetus from conception to birth.

(iii) materials designed to inform concerned parties that it is the policy of the County of Niagara to favor childbirth over abortion.

(iv) the materials required under subsection (a), (b) and (c) of this Section shall be available from the Department upon request and in appropriate number to any persons, facility or hospital.

(B) The Department shall also make available to physicians performing abortions in the County of Niagara notice laws, consent forms, abortion report forms and complication report forms.

(C) The requirement of giving notice, or obtaining written consent, of distributing the materials listed in Section "5"(A) of this Law, or of completion of abortion reports or complication reports shall not be imposed whenever the Department certifies in writing that the forms required by this Law are not presently available. The Department shall use its best efforts to insure that all of the forms required by this Law are in existence and are available to any interested person, facility or hospital.

Section 6. *Records*

(A) All abortion facilities and hospitals in which abortions are performed or induced shall keep

records, including admission and discharge notes, histories, results of tests and examinations, nurses work sheets, social service records, and progress notes, and shall further keep a copy of all written certifications provided for in this Local Law as well as a copy of records of notice and consent forms, proofs of written notice, abortion reports, and complication reports required under this Local Law. Such records shall be maintained in the permanent files of the hospital or abortion facility for a period of not less than seven (7) years.

Section 7. *Inspection*

(A) The medical records and the physical facilities of all abortion facilities and hospitals in which abortions are performed shall be open to inspection at any time by the Department for purposes of gathering statistical data and insuring compliance with the provisions of the Local Law.

(B) The medical records of abortion facilities and hospitals in which abortions are performed and all information contained therein shall remain confidential and shall be used by the Department only for the purposes set forth in paragraph (A) of this Section.

(C) The Department shall physically inspect all abortion facilities at least once every six (6) months to insure compliance with this Local Law and all laws, ordinances, rules and regulations of the State of New York and County of Niagara concerning health and sanitation.

Section 8. *Reporting*

(A) An individual abortion report for each abortion performed or induced upon a woman shall be completed by the attending physician. The report shall be confidential and shall not contain the name of the female. This report shall include:

(1) Patient number

(2) Name and address of the abortion facility or hospital

(3) Date of abortion

(4) Zip code of residence of pregnant female

(5) Age of pregnant female

(6) Race

(7) Marital status

(8) Number of previous pregnancies

(9) Years of education

(10) Number of living children

(11) Number of previous induced abortions

(12) Date of last induced abortion

(13) Date of last live birth

(14) Method of contraception at time of conception

(15) Date of beginning of last menstrual period

(16) Medical condition of female at time of abortion

(17) R H Type of pregnant female

(18) Type of abortion procedure

(19) Complications by type

(20) Type of procedure done after the abortion

(21) Type of family planning recommended

(22) Type of additional counselling given

(23) Signature of attending physician

(24) The certifications provided for in this Local Law

(B) An individual complication report for any post-abortion care performed upon a woman shall be completed by the physician providing such post-abortion care.

This report shall include:

(1) The date of abortion

(2) The name and address of the abortion facility or hospital where the abortion was performed

(3) The nature of the abortion complication diagnosed or treated

(C) All abortion reports shall be signed by the attending physician and submitted to the Department within thirty (30) days from the date of the abortion. All complication reports shall be signed by the attending physician and submitted to the Department within thirty (30) days from the date of the post-abortion care.

(D) A copy of the abortion report shall be made a part of the medical record of the patient of the facility or hospital in which the abortion was performed.

(E) The Department shall be responsible for collecting all abortion reports and complication reports and collating and evaluating all data gathered therefrom, and shall annually publish a statistical report based on such data from abortions performed in the previous calendar year.

Section 9. *Enforcement; Penalties*

(A) The County Attorney or any person whose consent is required either pursuant to this Local Law or under common law, may petition the Supreme Court for an order enjoining the performance of any abortion performed contrary to the provisions of this Local Law.

(B) Any person who willfully violates any of the provisions of this Local Law shall be subject to a fine and civil penalty of not less than $500.00 nor more than $1,000.00 for each violation.

Section 10. *Severability*

(A) Should any provision of this Local Law be construed by any court of competent jurisdiction to be invalid, unconstitutional, or otherwise unenforcible, such invalidity, illegality, unconstitutionality, or unenforcibility shall not extend to any other provision or provisions of this Local Law.

Section 11. *Construction*

(A) Nothing in this new law shall be construed:

(i) to alter common law and statutory requirements of informed consent to medical procedures; or

(ii) to diminish the common law and statutory rights of a parent, guardian or other person having legal custody of minor children; or

(iii) to limit the jurisdiction of any court of this state; or

(iv) to deny any person access to any court of this state.

Section 12.

This law shall take effect on the sixtieth (60) day after it shall have become a law except that the provisions of Section "5" with regard to the publication and distribution of forms by the Niagara County Department of Health shall take effect immediately.

RESOLVED, that the Laws and Legislation and Public Health Committees are hereby designated as the Committees of this Legislature to conduct a public hearing upon said proposed Local Law at the Legislative Chambers in the Court House, Lockport, New York, on the 12 day of September, at 7:30 P.M., and be it further

RESOLVED, that the Clerk of the Legislature shall post at least six days in advance of such hearing a notice upon the bulletin board in the Niagara County Court House and the County Buildings in Niagara Falls, North Tonawanda, and Lockport, and publish such notice once in the Union-Sun and Journal, the Niagara Gazette and the Tonawanda News each; such notice shall contain the title of the Local Law, and an abstract of the text to be prepared by the Clerk of the Legislature with the assistance of the County Attorney.

APPENDIX B

Additional Statutory Provisions

Municipal Home Rule Law

By §§ 10 and 11 of the Municipal Home Rule Law, Chapter 36-a of the Consolidated Laws of New York (McKinney's vol. 35c), the New York State Legislature implemented the provisions of Art. IX, § 2, subdivision (c) of the New York State Constitution. (See p. A-1, *supra.*)

Subparagraph [a] of subd. [1] of § 10 of said Law in pertinent part:

> § 10 *General powers of local governments to adopt and amend local laws*
>
> * * *
>
> a. A county, city, town or village:
>
> * * * (11) The government, protection, order, conduct, safety, *health,* and well-being of persons or property therein. This provision shall include but not be limited to the power to adopt local laws providing for the regulation or licensing of occupations or businesses provided, however, that:
>
> * * *
>
> (b) Except in a case where and to the extent that a county is specifically authorized to regulate or license an occupation or business, the exercise of such power by a county shall relate only to the area thereof outside any city, village or area of any town outside the village or villages therein during such time as such city, village or town is regulating or licensing the occupation or business in question. (emphasis supplied)

§ 11 of the Municipal Home Rule Law. pursuant to the same provision of Art. IX, § 2, subdivision (c) of the New

York State Constitution (p. A-1, *supra*) *restricts* the power of local governments to adopt a local law which supersedes a state statute within their local area. The subject matters so restricted are not relevant to Local Law No. 7 or the issues presented by this Petition.

Statute of Local Governments

The Statute of Local Governments, Chapter 58-A of the Consolidated Laws of New York (McKinney's vol. 35c) also implements Art. IX of the New York State Constitution in ways not pertinent to Local Law No. 7 or to the issues presented by this Petition.

Other General Laws

Prior to the adoption of Local Law No. 7, the Niagara County Legislature received an opinion of independant counsel that under then existing court interpretations the proposed local law would be consistent with and supplemental to the following general laws of the State of New York: Public Health Law, § 17 (medical records); § 347 (county ordinance); § 2305 (excuses notice to parent in cases of veneral disease); Art. 24-A (informed consent for human subjects of experiments); § 2504 (consent to medical treatment over age 18, etc.); § 2805-d (definition of informed consent in malpractice); Title III (birth records; definition of live birth); Title V (fetal deaths, def.); Title V-A (induced viable birth); § 2503 (drug information to expectant mother); Title XII (toxic substances; Niagara County); § 2500-c (drug DES; importance of mother's medical history for pregnant minor). See Record on Appeal, Exhibit No. 2, pp. 36-37.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-634

FRANCIS CLIFFORD, COMMISSIONER OF THE DEPARTMENT OF HEALTH OF NIAGARA COUNTY, NEW YORK,
Petitioner

v.

SUSAN B., ET AL.
Respondents

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 27, 1980.

THURGOOD MARSHALL
Associate Justice of the Supreme Court of the United States

Dated this 25th
day of January, 1980.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Thirtieth day of October one thousand nine hundred and seventy-nine.

Present: HONORABLE THOMAS J. MESKILL,
HONORABLE AMALYA L. KEARSE, *Circuit Judges,*
HONORABLE JOHN F. DOOLING, *District Judge.**

#79-7443

SUSAN B., DONNA MARIE HAZLETT and EMMA G., on their own behalf and on behalf of all others similarly situated,
Plaintiffs-Appellees,

v.

FRANCIS CLIFFORD, Commissioner of the Department of Health of Niagara County, N.Y.,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

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* Hon. John F. Dooling, United States District Judge for the Eastern District of New York.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby affirmed substantially on the opinions of Judge Elfvin below dated December 15, 1978, and May 23, 1979.

THOMAS J. MESKILL

Thomas J. Meskill, U.S.C.J.

AMALYA L. KEARSE

Amalya L. Kearse, U.S.C.J.

JOHN F. DOOLING

John F. Dooling, U.S.D.J.

APPENDIX E

CIV-78-823

MEMORANDUM and ORDER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SUSAN B. and DONNA MARIE HAZLETT, on their own behalves and on behalf of all others similarly situated,

Plaintiffs,

VS

FRANCIS CLIFFORD, Commissioner of the Niagara County Health Department,

Defendant.

Plaintiffs allege that Niagara County Ordinance 336-78 (Exhibit A to the complaint herein) infringes upon their constitutional rights to seek abortions and that the ordinance is invalid under New York State Law. Plaintiffs request and defendant opposes the issuance of a temporary restraining order ("TRO").

When the action was initiated and the motion for the TRO argued, "Susan B." was the sole named plaintiff. After oral argument on the motion, the complaint was amended to include Donna Marie Hazlett as a plaintiff. She is alleged to be a married woman who has been told by her doctor that the fetus she is carrying is probably dead or has defects. Hazlett has decided to have an abortion and

does not want to undergo the counseling mandated by Niagara County Orinance 336-78, nor does she want to wait five days from the date of notification to her husband to have her abortion. Although Hazlett resides in Erie County, her attending physician practices in Niagara County and is associated with a hospital in Niagara County. The provisions of the Niagara County ordinance apply to any female having an abortion in Niagara County. Susan B. is alleged to be a young unmarried woman who desires an abortion. Susan B. is her pseudonym. Her existence and status have not yet been satisfactorily demonstrated to the court. For present purposes the presence of Hazlett makes unnecessary any present inquiry re Susan B.

Oral argument on plaintiffs' request for a TRO was held December 5, 1978. Three individuals were allowed to argue as *amici curiae*.[1] At the end of the argument, there was a discussion concerning the need for further hearings and/or arguments before a decision could be made on plaintiffs' request for a preliminary injunction. Plaintiffs' position was that no further hearings were necessary if the court found the state law argument sufficient to permit the issuance of a preliminary injunction but that, if the court decided it had to reach the constitutional issues in order to rule concerning a preliminary injunction, an evidentiary hearing would be necessary. The defendant and the *amici* stated that an evidentiary hearing was needed before the court could decide the constitutional issues.

Jurisdiction over the subject matter of plaintiffs' constitutional claims exists under 28 U.S.C. § 1331(a). This court has pendent jurisdiction over the state law claim.

1. The individuals are Marie Crosson, a young woman residing in Niagara County who wishes the ordinance to remain in effect, and James and Pat Foltz, parents of a twelve-year old girl suffering from a heart condition, who would want to be notified if their daughter were scheduled to undergo an abortion.

Injunctive relief, whether of a temporary or a permanent nature, requires the showing of irreparable harm and either probable success on the merits or sufficiently serious litigable questions and a balance of hardships tipping decidedly toward the party requesting such relief. *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49 (1975). A finding of irreparable harm in the instant case is dependent upon plaintiffs' showing a likelihood of success on the merits.

In *Robin* v. *Incorporated Vil. of Hempstead*, 334 N.Y.S. 2d 129 (1972), the New York Court of Appeals held that local authorities were prohibited from passing regulations dealing with abortion because the state had pre-empted that field. The court cited New York's Public Health Law § 2800 in support of its conclusion. The language of section 2800 has not changed since the New York State Court of Appeals issued its decision in *Robin;* therefore, there is no reason to believe that the *Robin* case does not accurately reflect the present law of New York. Crosson argued that *Robin* creates an exception when there are unique local circumstances justifying local action and cites the "Love Canal" situation[2] as such justification for the enactment of the present abortion ordinance. This argument is without merit. The first eight paragraphs of the ordinance set forth the reasons for its enactment without any mention of the

2. The Love Canal is the popular name tag for a phenomenon that was discovered—rather, uncovered—during 1978 in one part of the City of Niagara Falls in Niagara County. At an earlier date one William Love had dug a canal which was purposed at channeling certain waters from their source to a point of industrial use. The project was not completed and, at a later time, a Niagara County manufacturer of chemicals utilized a portion of the excavation as a depository of its chemical wastes. Residences and a school more recently came into being at or near such depository and in 1978 there was great alarm (which continues) concerning the toxic effects upon human beings and upon humans yet to be born. A national emergency was declared.

Love Canal or any comparable circumstances. The sections governing medical counseling of the female and distribution of printed material to the female do not mention the topic of printed material to the female do not mention the topic of chemical or other local toxicity. The *Robin* case is a clear pronouncement of New York State law. There are no questions of fact to be considered in resolving the state law claim; therefore, there is no need for an evidentiary hearing. Plaintiff's request for a preliminary injunction is hereby consolidated with her request for a TRO. However, this disposition is without prejudice to the right of any party to request further hearings and to move for vacatur of the preliminary injunction now being granted.

Although Niagara County Ordinance 336-78 does not prevent a woman from having an abortion, it does place restrictions thereupon. In view of the statutory preemption of the field by the state, Niagara County does not have the authority to regulate abortions; therefore, the ordinance is an unwarranted local interference with the practice and allowability and control of abortions on a state-wide basis. The continuing local interference establishes irreparable harm. *New York Path. & X-Ray Lab., Inc.* v. *Immigration & N.S.*, 523 F.2d 79 (2d Cir. 1975).

It is therefore hereby

ORDERED that defendant, his agents, employees and successors are preliminarily enjoined from enforcing or executing the restrictions and regulations contained in Niagara County Ordinance No. 336-78.

Dated: Buffalo, N. Y.
December 15, 1978

JOHN T. ELFVIN
U.S.D.J.

APPENDIX F

SUPREME COURT
STATE OF NEW YORK
COUNTY OF NIAGARA

JOHN H. KOLECKI, LOUIS E. CAGGIANO, JAMES FOLTZ, PATRICIA FOLTZ and MARY CELESTE CROSSON, Individually and on behalf of all others similarly situated,

Plaintiffs

—against—

THE COUNTY OF NIAGARA

and

JOHN V. SIMON, County Attorney and FRANCIS CLIFFORD, Commissioner of the Niagara County Health Department in their official capacities,

Defendants.

APPEARANCES: Frank J. Moran
A. Lawrence Washburn, Jr.
Attorneys for Plaintiffs.
John V. Simon
Attorney for Niagara County,
Michael A. Gold of Counsel.
Steven R. Shapiro
Barbara Ellen Handschu
Attorneys for amicus curiae,
Susan B. and Donna Marie Hazlett.

BROUGHTON, J. This is an action for a declaratory judgment adjudging that the County of Niagara acting

through its County Legislature, lawfully adopted Local Law No. 7 regulating the performance of abortions in that county. The plaintiffs have moved for summary judgment upon the basis that only a question of law is involved as to the power of the County Legislature to adopt the measure within the provisions of the New York State Constitution, Article IX, Section 2, Subd. (c).

The plaintiffs John H. Kolecki and Louis E. Caggiano are residents of the County and are both members of the County Legislature who voted in favor of the adoption of Local Law No. 7. The plaintiffs James and Patricia Foltz are also residents of the County and are the parents of a minor child said to be of child bearing age. The plaintiff Mary Celeste Crosson is a county resident of child bearing age attending and residing on the Niagara University Campus.

The defendants, John V. Simon, County Attorney of Niagara County and Francis Clifford, M.D., Commissioner of the Niagara County Health Department have been eliminated as defendants upon stipulation during oral argument of the motion for summary judgment leaving the County of Niagara as the sole defendant.

By an earlier order of this Court certain individuals who are plaintiffs in a declaratory judgment and an injunction action now pending in the U.S. District Court involving the same Local Law No. 7 were granted status as amicus curiae in this action.

Briefly stated, the events which precipitated this action began with the adoption of Local Law No. 7 by the Niagara County Legislature on October 3, 1978 to become effective on the 60th day after its passage.

That ordinance, while it does not prohibit the performance of abortion procedures in the County of Niagara,

does contain rather detailed requirements concerning informed consent, notice to spouses and parents, and reporting provisions coupled with authorization for the imposition of a fine or penalty of not less than $500 nor more than $1,000 in the event of violation.

On December 5, 1978 an action was commenced in the U.S. District Court for Western New York against Dr. Clifford as Commissioner of the Niagara County Health Department by one Susan B., a pseudonyn for young unmarried female said to be a resident of Niagara County who desired to have an abortion performed. That action sought a declaration that Local Law No. 7 was an unconstitutional interference with the right of the plaintiff and others similarly situated to obtain an abortion and sought a permanent injunction against its enforcement.

Following commencement of that action a motion was made for a temporary restraining order which was merged with the application for a preliminary injunction and granted on December 15, 1978. Upon argument of that application in the District Court, one Donna Marie Hazlett, alleged to be a pregnant married woman not a resident of Niagara County who desired to have an abortion performed there by her physician, was added as a party plaintiff.

It further appears that a third plaintiff, Emma G. (also a pseudonym), a married, pregnant Niagara County resident has also been joined in the action as a plaintiff. James and Patricia Foltz and Celeste Crosson, plaintiffs in the subject action have been granted standing and status as amicus curiae in the District Court proceeding.

As matters now stand then, implementation of Local Law No. 7 is and has been enjoined by the U.S. District Court since December 15, 1978 and a motion is now pending before

that Court, returnable on March 5, 1979 for a summary judgment granting, inter alia, a permanent injunction against the enforcement of Local Law No. 7 upon the principal ground that it is invalid as a matter of State law and because its enforcement would violate the federal plaintiffs' rights under the 1st, 4th, 5th, 9th and 14th amendments to the United States Constitution.

The District Court, in granting the preliminary injunction held that as a matter of State law local political subdivisions in the State of New York were precluded from adopting local laws or ordinances regulating the performance of abortions since the State of New York itself had preempted that field to exclusion of all local authorities. In reaching that determination the District Court relied upon a decision of the New York State Court of Appeals in *Robin* v. *Incorporated Village of Hempstead,* 30 N.Y. 2nd 347 (1972), which struck down an ordinance of that Village requiring that abortions be performed only in an accredited hospital.

Specifically, the Court of Appeals held that the Village was without power to enact the ordinance since the State itself had pre-empted the subject of abortion legislation and occupied the entire field so as to prohibit additional regulation by local authorities of the same area.

The plaintiffs in the present suit do not question the applicability of the Robin decision, but seek a declaration that the so called "Love Canal" situation constitutes a local problem enabling the County Legislature to validly adopt Local Law No. 7. They desire that this question be determined by this Court so that an appeal may be taken directly to the New York Court of Appeals and the issue resolved as a matter of State law.

Unfortunately, this Court is precluded from rendering a determination upon that question because no justiciable

controversy is presented by the plaintiffs' complaint or the affidavits submitted in support of their motion for a summary judgment. It must be recalled that the present action is one to have a law declared to be *constitutional,* not an action by persons who claim that enforcement of the ordinance would constitute infringement of their rights.

Local Law No. 7 as adopted enjoyed the presumption of constitutionality extended to any duly enacted law, be it State or local, *People* v. *Epton*, 19 N.Y. 2nd 496, and while that presumption is rebutable (*Lincoln Bldg. Associates* v. *Barr,* 1. N.Y. 2nd 413) it continues until the statute or ordinance is declared to be invalid by a court of competent jurisdiction, (*Town of Babylon* v. *Conte,* 61 Misc. 2nd 626). In this action the plaintiffs seek a declaration that Local Law No. 7, adopted by the defendant County of Niagara is constitutional while the defendant County of Niagara must perforce also support the validity of its own enactment.

Whatever the personal professional opinion of the County Attorney may be (and he did appear in the District Court to argue against the granting of the preliminary injunction), the position of the County of Niagara cannot be otherwise than in favor of the ordinance adopted by its own legislative body. As between these parties then, there is no controversy for the Court to resolve and no basis for a declaratory judgment pursuant to CPLR 3001. (*Goodman & Co.* v. *New York Tel. Co.*, 309 N.Y. 258).

The only dispute here arises from the fact that the plaintiffs, as many others may be, are disappointed by the District Court's injunction against the enforcement of Local Law No. 7. This is made plain by the statement in the affidavit of plaintiffs' counsel that "The controversy herein is created by the Federal Court preliminary injunction . . ." (Plaintiffs' "Affirmation in Support of Summary Judg-

ment . . .", p. 7, par. 15). That does not create a justiciable controversy between these parties subject to resolution in this Court.

The plaintiffs have constructed a rather elaborate argument to the effect that since the federal court's finding that the plaintiffs there showed a likelihood of success on the basis of the Robin case is merely a forecast of New York law and is non-final in nature that this Court may proceed to determine that question for itself. That is to say that parallel actions for the same relief involving different plaintiffs might proceed simultaneously in both state and federal courts. That may well be, but the real difficulty is that we do not now have two bona fide actions proceeding at once. Aside from the fact that there is no actual dispute or controversy present in this action, none of these plaintiffs, unlike those in the federal suit, has any personal standing to maintain this proceeding. (*Roe* v. *Wade, 410 US 113, 352, Ed 2 694; Doe* v. *Bolton, 410 US 179, 35 L. Ed 2 201*).

Had an action been commenced in this Court by parties having the requisite standing to challenge the constitutionality of Local Law No. 7 the plaintiffs' arguments would be in point and this Court might well have proceeded to determine whether or not Local Law No. 7 was a valid enactment as a matter of State law. In as much as that is not the case here, the plaintiffs' motion for summary judgment must be denied and since the complaint does not state a cause of action upon which relief may be granted, the complaint itself must be dismissed. (*CPLR 3212 (b)*.)

It should be noted that this result does not leave the plaintiff without a forum in which their claims can be presented. The plaintiffs Foltz and Crosson have been granted standing as amicus curiae by the District Court and presumably others of similar persuasion could also apply for that status. In addition, the District Court in granting the preliminary injunction of December 15 did so, "Without prejudice to the right of any party to request further hearings and to move for vacatur of the preliminary injunction now being granted". Thus an avenue for relief has been left open should the defendant County of Niagara desire to present additional arguments or proof with respect to the so called local problem "exception" relied upon here to sustain the validity of Local Law No. 7.

Submit order.

JOHN C. BROUGHTON
SUPREME COURT JUSTICE

Dated: February 15, 1979

APPENDIX G

MEMORANDUM and ORDER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CIV-78-823

SUSAN B., DONNA MARIE HAZLETT and EMMA G., on their own behalf and on behalf of all others similarly situated,
Plaintiffs,

—VS—

FRANCIS CLIFFORD, Commissioner of the Department of Health of Niagara County, N. Y.,
Defendants

Plaintiffs move for class action certification and for partial summary judgment on their state law claim (as set forth in paragraph 23 of their Second Amended Complaint). Defendant opposes the motion for partial summary judgment.

Class Action Motion

Plaintiffs satisfy the criteria set forth in Fed.R.Civ.P. rule 23(a). The class is so numerous that joinder is impractical, there are questions of law and fact common to the class, the aims of the representative parties are typical of the class and it appears at this time that plaintiffs will fairly and adequately protect the interests of the class. Certification pursuant to rule 23(b)(2) is proper in this case inasmuch as defendant has acted on grounds generally applicable to the class, thereby making final injunctive or

declaratory relief appropriate with respect to the class as a whole.

Amici wrote the court stating that plaintiffs' proposed class was too broad because it included women who did not object to Local Law No. 7 of 1978 ("Local Law No. 7"). A class should be so defined that all members of the class have standing to maintain the action. *Lamb* v. *Hamblin,* 57 F.R.D. 58 (D. Minn. 1972). Consequently, the plaintiff class shall include all women who are or may become pregnant and who desire or may desire an abortion to be performed in Niagara County by the physician of their choice and who do not wish to be subject to the mandates of Local Law No. 7.

Motion for Partial Summary Judgment

Defendant opposes the motion, arguing that the court should abstain from deciding the state law question. Defendant contends that the state courts are in a better position to decide whether the health problems caused by exposure to toxic chemicals are a special local condition justifying the local legislation involved in the instant case. Amici originally argued the case on the merits, but now take the position that abstention is warranted. Amici claim that "[t]he question of what, if any, abortion-related local laws will fit within the exception delineated by the New York Court of Appeals in the *Robin* case [*infra*] is an *uncertain* question of state law under the rule of *McRedmond* v. *Wilson,* [533 F.2d 757 (2d Cir. 1976)]." (Washburn affirmation dated March 3. 1979.) Plaintiffs assert that *Robin* v. *Incorporated Vil. of Hempstead,* 30 N.Y.2d 347 (1972), is a clear pronouncement of state law and that resolution of the issues presented in the instant case involves only an application of adequately defined state law.

Plaintiff's argument is well taken. This case does not involve an uncertain question of state law as such term is used in *Railroad Comm'n* v. *Pullman Co.,* 312 U.S. 496 (1941), and *Reid* v. *Board of Education of City of New York,* 453 F.2d 238 (2d Cir. 1971). New York State's Court of Appeals has found an intent upon the part of the state "to preempt the subject of abortion legislation and occupy the entire field so as to prohibit additional regulation by local authorities in the same area." *Robin* v. *Incorporated Vil. of Hempstead,* 30 N.Y.2d at 350. Where the state has preempted an area, local legislation that inhibits what the state has allowed is considered to be inconsistent with the state legislation. *People* v. *Cook,* 34 N.Y.2d 100, 109 (1974); *S. H. Kress & Co.* v. *Department of Health,* 283 N.Y. 55, 59 (1940); *Kim* v. *Town of Orangetown,* 66 Misc. 2d 364, 321 N.Y.S.2d 724 (S.Ct., Rock. Co. 1971). However, such inconsistent legislation may be upheld if it is based on a unique local situation. *People* v. *Cook, supra; Robin* v. *Incorp. Vil. of Hempstead, supra; S. H. Kress & Co.* v. *Department of Health, supra; Kim* v. *Town of Orangetown, supra.* The parameters of the home rule power available to Niagara County in the instant case have been clearly set forth by the New York courts. The question is whether this particular local law falls within the ambit of such power. This is not the type of state law question that requires abstention.

Amici argue that the Love Canal situation (as to which reference should be had to page 3 of my Memorandum and Order filed December 15, 1978) is a special condition permitting the enactment of Local Law No. 7. They assert that the Niagara County legislature believed an increase in the number of abortions would result from people's fears concerning the effects of exposure to toxic chemicals on a fetus

and wanted to insure that women would make an informed choice on the question whether to have an abortion. Defendant joins in the argument. Plaintiffs contend that the Love Canal situation was not a substantial moving force behind the passage of Local Law No. 7 and, therefore, cannot be used to support the law. The file accompanying Local Law No. 7 was submitted by amici. The file contains written statements sent by mail or submitted at the time of the public hearing on the law. I have reviewed the file and find that none of the speakers addressed pregnancy-related problems in relation to prolonged exposure to toxic chemicals. Furthermore, none of the speakers favoring the law asserted that it was necessitated by the Love Canal situation.

Amici set forth a "chronology of facts" preceding enactment of Local Law No. 7, arguing that such facts demonstrate that the Love Canal situation was in the minds of the Niagara County legislators at the time they passed Local Law No. 7. After reviewing these "facts", I cannot accept amici's argument that the Love Canal situation was a substantial reason for the enactment of Local Law No. 7. The passage of title XII (sections 1385-1389) of the Public Health Law by the state legislature does not provide Niagara County with a justification for all health-related legislation. There must be a nexus between the legislation and the problems posed by exposure to toxic substances. *Cf., Good Humor Corporation* v. *City of New York,* 290 N.Y. 312 (1943). Furthermore, title XII does not increase the home rule power given to Niagara County; it authorizes the department of health to conduct a study to determine the extent to which toxic substances are exposing citizens of the state to unnecessary hazards. Although a Dr. Clifford spoke to the Niagara County legislature on the Love Canal

situation, there is no indication that his remarks were connected to Local Law No. 7. Dr. Dennis Bonnette's remarks concerning the Lovel Canal were extremely brief; his statement makes it clear that he believed the local law deserved "enactment on its own merits". There is no suggestion in his remarks that the legislation was needed to cope with problems arising from exposure to toxic chemicals. Former United States Senator James L. Buckley's comments do not deal with the issue of exposure to toxic chemicals. Ms. O'Connor, in her address, briefly remarked upon the lack of knowledge concerning the effects of chronic exposure to toxic wastes and the problems such could cause an anesthesiologist. This problem is not touched upon in Local Law No. 7.

Niagara County Legislator Kolecki, the sponsor of the legislation, spoke on its behalf at the outset of each of the public hearing's two sessions. He stated that, while he respected and honored the United States Supreme Court's decision legalizing abortions, he viewed it as having many shortcomings. It was, he said, for that precise reason that he sponsored the resolution. He submitted that the court fell short "of safeguarding the health and welfare of pregnant women who choose to have an abortion, and to safeguard the civil rights of parents, guardians and spouses." This void, he hoped, would be eliminated by his proposal which had as its main thrust the protection of the health and welfare of pregnant women who are contemplating abortion. Legislator Kolecki did refer to the Love Canal in his remarks at the opening of the initial session of the public hearing as follows:

> "To many of us it is common knowledge that we are living in a permissive society, and yet few of us can decide how permissive we want our society to be, or how nonpermissive we think our society should become. Moreover, most of us today are divided on the subjects of obscenity, Proposition 13 needless to say, and we are faced with the cripling [sic] problem of Love Canal & the crucial issue of abortion."

Attorney A. Lawrence Washburn, who represents an amicus here, spoke at the public hearing concerning the serious concern expressed by the County Attorney of Niagara County with the *Robin* decision. He said:

> "[N]othing in the [*Robin*] case precludes you from adopting a local law dealing with health conditions peculiar to Niagra [sic] County as opposed to the rest of the State.***
>
> "The existence of local health problems peculiar to Niagra [sic] County as opposed to the rest of the State has been expressly recognized by our State Legislature *** in dealing with Toxic Substances [sic] and [citing] certain landfill conditions believed to exist in Niagra [sic] County as showing the need for immediate legislative action. It would be preposterous to say that Niagra [sic] County does not have a serious local health problem affecting pregnant women, some of whom may be panicked into seeking unnecessary abortions.
>
> "The proposed local law *** seeks to place at the disposal of the pregnant woman and her physician *all* of the facts concerning the condition of the woman and her unborn child. Clearly, facts relating to the environment in which the pregnant woman has lived may be known to her husband, but unknown to her.***"

Although the toxic chemical problem in Niagara County is a unique local condition, it cannot be used to support Local Law No. 7. Inconsistent local laws must be based upon special conditions existing in the county. *People* v.

Cook, supra; Robin v. *Incorporated Vil. of Hempstead, supra; Kim* v. *Town of Orangetown, supra.* In other words, the law must be an attempt to deal with the unique local problem.

It is important to note that Love Canal as a local problem—a serious local problem—does not support this legislative effort. Whatever can be said of the justification for the adoption of Local Law No. 7, its purpose is not to make abortions easier to obtain in Niagara County. Whereas prior to its effective date consent to the procedure must have been obtained or given as with any surgical procedure, thereafter such consent must be certified and in writing and state affirmatively that the consent is an informed one and freely given and not the result of coercion. It cannot be obtained later than the 24th hour before the operation. The woman and the physician each must certify that the former has received and read and understands certain specified materials none of which speak of or deal with effects of ambient toxicity upon unborn children and all of which expose the woman to persuasions to carry the fetus for the full period of gestation and to produce a living child. (Section 5(A)(iii) flatly states "that it is the policy of the County of Niagara to favor childbirth over abortion.") The physician must have proof that the woman's spouse (if any) has received five days' notice of the abortion and copies of said materials. If the woman is a minor who has never married, the physician must have proof that her parent or guardian or legal custodian had five days' notice of the abortion and copies of said materials and must possess a consent obtained by a court order after a hearing. The local law does not limit itself in its applicability to women who live or have lived in an area or atmosphere of toxic wastes. It does not limit itself even to abortions performed

on Niagara County residents but applies as fully to foreign residents who might, for very good reasons, wish to have an abortion performed in Niagara County.

The language of Local Law No. 7 shows that it was enacted in the belief that women should be warned of the possible medical complications of an abortion and that minors should not undergo an abortion without the consent of their legal guardian or without an order of the Supreme Court of New York State. The whereas clauses of Local Law No. 7 demonstrate that the prime motivating factor behind the passage of the law was the legislature's desire to insure that women considering an abortion were presented with "evidence" tending to show that human life begins at conception. These reasons are not related to the issue of exposure to toxic wastes. The topic of toxic wastes is not mentioned in the law. The law does not require that physicians inform women, their spouses or their parents of the medical problems that could occur during an abortion or during pregnancy as a result of exposure to toxic wastes, nor does it require that physicians inform women of the chances of their encountering such problems. During the public hearings on Local Law No. 7, many of the speakers addressed themselves to the physical and psychological ramifications of abortions and the paucity of information available dealing with such to women contemplating an abortion. Although abortions can have physical and psychological consequences, such are not peculiar to women residing in Niagara County and are not the result of exposure to toxic wastes. Local Law No. 7 does not fall within the special local condition exception set forth in *Robin* v. *Incorporated Vil. of Hempstead, supra.*

It is therefore hereby

ORDERED that the action herein shall be maintained as a class action pursuant to Fed.R.Civ.P. rule 23(b)(2) and that the class shall be comprised of all women who are or may become pregnant and who desire or may desire an abortion to be performed in Niagara County by the physician of their choice and who do not wish to be subject to the mandates of Local Law No. 7; and it is further

ORDERED that plaintiffs' motion for partial summary judgment on their state law claim is granted; and it is further

ORDERED that defendant, his agents, employees and successors are permanently enjoined from enforcing or executing the restrictions and regulations contained in Local Law No. 7.

Dated: Buffalo, N. Y.
May 23, 1979

JOHN T. ELFVIN
U.S.D.J.